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No. 85-930

In the

Supreme Court of the United States

October Term, 1985

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

- against -

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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Petitioners Arthur Chambless and Mildred H. Chambless respectfully submit this brief in reply to the respondents' brief in opposition to their petition for the grant of a writ of certiorari.

ARGUMENT

The pension plan respondents incorrectly contend that the petitioners "did not even challenge the Plan's retirement-defined rule as arbitrary." (p. 7).

On the contrary, however, the petitioners' pre-trial memorandum dated October 21, 1983, specifically states (p. 15):

"The action of the trustees is arbitrary and capricious in the manner in which the Pension Plan is administered. The plaintiffs will present evidence to show (a) that the Pension Plan has no regular system for investigating compliance with the prohibitions on certain types of other employment, and (b) that the application of said provisions is arbitrary and capricious in any event because they are mutually inconsistent and have been in a constant state of change."

The contention was reiterated in petitioners' proposed post-trial findings to the District Court as follows (p. 23):

"The 'retirement defined' regulations are discriminatory in themselves in that they permit certain types of maritime employment while penalizing others.

References:

"Plaintiffs' Exhibits 40 and 8 (pp. 128–129a);
Defendants' Exhibit III (Article II-A §17)."

At page 8, the brief of the pension plan respondents contends, also incorrectly, that "neither the ADEA claim, nor Chambless' retaliation claim under §510 of ERISA, was raised below. . . ."

On the contrary, the complaint herein specifically refers to the nondiscrimination provisions in §510 of ERISA (29 U.S.C. §1140), and alleges that the action of the defendants (¶28):

"(d) Is punitive in purpose and effect, discriminating against more experienced licensed deck officers including plaintiff who serve on non-M.M. & P. vessels because they reject harassment by the M.M. & P., or the alternative of assignment to a substandard position or forced retirement from their profession, and violates 29 U.S.C. §1140, [*i.e.*, §510] because it was adopted to discriminate against such participants and for the purpose of interfering with the attainment of rights to which they and their beneficiaries are entitled."

Further, petitioners' brief to the Court of Appeals refers to age discrimination as a part of a pattern of intentionally discriminatory conduct (pp. 46–47).

In addition, the petitioners' Post-Trial Proposed Findings of Fact dated December 16, 1983, specifically state (pp. 41-43):

"The Amendments and the underlying motivation are in conflict with the strong public policy that prohibits discrimination against older employees.

References:

"United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, 575 (1982), stresses the importance of public policy factors in evaluating the reasonableness of pension plan provisions;

"Trial Tr., Chambless, pp. 702-3, 708 (Walter Anderson, the MM&P Port Agent in the hiring hall in Mobile, Alabama, sought to induce Captain Chambless to retire by saying that he would only be permitted to sail as Second or Third Mate in the future, and that the Union wanted him out 'because they wanted to replace the older men with new blood';

"Trial Tr., Lowen, pp. 225-230 (Similarly, the President of the MM&P, Lowen, confirmed that action had been taken over a period of years to retire older employees in the interest of getting 'new blood in the Union'. In his testimony, when this was brought to his attention, Lowen did nothing to repudiate or otherwise explain the policy that had thus been expressed by him);

"The continuing bias against the older members is shown by statements by the MM&P President indicating a desire to cull out the older members in favor of the younger members on the pretext that the latter are 'more readily adaptable to retraining';

"See also Plaintiffs' Exhibit 15, p. 2;

"Plaintiffs' Exhibit 20;

"The discriminatory motivation for the Amendments is not disputed. What is admitted to have been intended as a 'harsher penalty' (Pension Plan Pre-Trial Memorandum, p. 10), was designed to prevent older members of the workforce from continuing to engage in productive employment in their chosen field, and was adopted as part of a program designed to favor younger employees and bring 'new young blood' into the Union. Such a discriminatory

motivation in connection with pension benefits is improper and will not constitute adequate justification for action taken by a pension plan. See *EEOC* v. *Home Insurance Company*, 672 F.2d 252, 262 (2d Cir. 1982), rejecting each of the five purported justifications for lowering a mandatory retirement age for being in conflict with the Age Discrimination in Employment Act."

Finally, the petitioners' brief to the Court of Appeals states (p. 31):

"In forcing a 'Hobson's choice' upon Captain Chambless and the older licensed deck officers, coupled with a 'harsher penalty' if they took other employment, the defendants behaved in a strikingly non-fiduciary manner, in their quest for 'new young blood' (and higher income from initiation fees – estimated to run nearly a half a million dollars a year). Captain Chambless therefore should recover as compensatory damages the economic consequences to him, as well as any benefit that the defendants have retained."

Respondents here rest virtually their entire opposition argument on the claim that punitive action against Captain Chambless was justified because he failed to comply with respondents' retirement rules. But that is a major issue in this case, whether respondents can, in compliance with the antitrust laws, erect a barrier to petitioner's engaging in lawful competitive employment by the denial or impairment of his vested pension benefits if he does so. The anti-competitive motive of respondents is not in dispute. In their Cross-Petition here in Docket No. 1097, respondents candidly admit that their purpose was to discourage "[pension plan] participants from making their services available to non-contributing employers." (p. 5)

It is submitted that such a motive, admitted by respondents, violates well-settled law as previously enunciated by this Court. *UMW* v. *Pennington*, 381 U.S. 657 (1965); *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982).

Indeed, Judge Carter, in his decision herein below, states that:

"The Union cannot adopt a policy of forcing applicants to retire or face low-paying assignments *or penalize them from working apart from MM&P*. . ." (B-10; emphasis added.)

See *Duchow* v. *IBT Retirement Fund*, 691 F.2d 1978 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983), which establishes that ERISA should not be interpreted so as to vitiate pre-ERISA rights.

CONCLUSION

The contentions of the pension plan respondents should be rejected as without merit. The gross abuse of fiduciary standards of conduct as exemplified by the findings in the instant case should lead to the granting of a writ of certiorari to Captain Arthur Chambless and Mrs. Mildred Chambless to review the issues raised by their petition herein.

Respectfully submitted,

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